IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE No 1 of 2001

with

CRIMINAL APPEAL No 555 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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STATE OF GUJARAT

Versus

MOHMMED MATIN HABIB ANSARI

Appearance:

1. Criminal Confirmation Case No. 1 of 2001
   MR AD OZA, PP, for Petitioner No. 1
   MR DEEPAK M SHAH for Respondent No. 1-2
2. Criminal Appeal No. 555 of 2001
   MR DEEPAK M SHAH for Petitioner No. 1
   MR AD OZA, PP, for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL

and

MR.JUSTICE A.L.DAVE

Date of decision: 20/08/2002

C.A.V. JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. An incident occurred on May 14, 2000 at about 11.30 hours at 70, Pujari'ni Chali, Chartoda Kabrastan area of Gomtipur, Ahmedabad, in which five persons lost their lives out of burn injuries suffered by them. Out of the five persons who lost their lives, one was Sajidabanu, aged 26 years; her three children named Nesreenbanu, Nazreenbanu and Talseembanu aged 5, 4 and 2, respectively; and her brother-Izhar Ahmad, aged 22 years. A First Information Report was lodged with Gomtipur Police Station vide C.R. No.I 86/2000 by Taiyabali Ansari, husband of Sajidabanu implicating his own father-Mahmad Mateen Habeeb Ansari and his brother-Narulen alias Pappu Mahmad Mateen Ansari, alleging that they had poured kerosene on the victims, locked them in the house and set the house on fire. The motive attributed to the accused persons was a family property dispute. On basis of that F.I.R., investigation was made and charge sheet came to be filed in the Court of learned Metropolitan Magistrate for offences punishable under Sections 302 read with 34, 120-B and 506(2) read with 34 of Indian Penal Code. The case was committed to the City Sessions Court and registered as Sessions Case No.297 of 2000. The learned Additional City Sessions Judge, Court No.7, Ahmedabad, recorded a conviction for both the accused persons for the offence of murders under Section 302 read with 34 of I.P.C. in Sessions Case No.297 of 2000 on July 10, 2001. After hearing the accused persons on question of quantum of punishment, as required under Section 235(2) of the Code of Criminal Procedure, the learned Additional City Sessions Judge found that the case fell in the category of rarest of rare cases where capital punishment would be the only appropriate punishment and, therefore, awarded the same on both the accused persons, subject to confirmation by this Court, as required under Section 366(1) of the Code of Criminal Procedure.

1.1 The said judgment and order of the learned Additional City Sessions Judge, Ahmedabad, recording conviction and inflicting capital punishment has given rise to Confirmation Case No.1 of 2001.

1.2 Aggrieved by the said judgment and order, the convicts have preferred Criminal Appeal No.555 of 2001.

2. The Registry, after complying with the procedural requirements, placed these matters for final hearing. Since both the matters arise out of the same judgment and order, they are heard together and decided by this common judgment.

3. In order that the contentions raised before us by the parties may be appreciated in their proper perspective, it would be appropriate if the facts of the case are substantially stated. Mohmad Mateen Habeeb Ansari, who was accused No.1 and Narulen alias Pappu Mahmad Mateen Ansari, who was accused No.2 before the Sessions Court, have preferred the appeal as appellants No.1 and 2 respectively. They are referred to in this judgment as "appellant No.1 and appellant No.2" respectively.

4. As per the prosecution case, appellant No.1 is a native of Ramnagar, Moharabadashapur, District Jaunpur, Uttar Pradesh. He has shifted to Ahmedabad for last about 20 years and was staying at House No.7, Pujari'ni Chali, Opposite Chartoda Kabrastan, Gomtipur, Ahmedabad, with his family. He was engaged in tailoring work with Sentiment Tailors, situated at C.G. Road, Ahmedabad. He has two sons and three daughters, of which Taiyabali (the complainant) is the eldest. Younger to him is Narulen alias Pappu (appellant No.2). The three daughters are married and are staying at their matrimonial house.

4.1 Appellant No.2 was married to Zarina around 1999.

4.2 About 4-5 months prior to the date of incident, i.e. May 14, 2000, as per the case of the complainant, appellant No.1 had asked the complainant to leave the house and stay separately with his family or to go to the native place. This gave rise to a dispute in the family. The family was split into two factions. Appellant No.2, the younger brother, sided with the father-appellant No.1 and petty quarrels continued in the family on this count.

4.3 About two months prior to the date of incident, because of the quarrel on this count, Taiyabali constructed a wall dividing the house into two, providing him with a separate room. One room was occupied by the complainant, the other room continued to be in occupation of the appellants. The dividing wall was not from floor to floor, but was constructed half way and, therefore, it would be possible for a person to jump the wall and enter the other room. The ceiling to the house was made of

steel sheets. After the said incident, brother-in-law of the complainant-Izhar Ahmad, aged 22 years, came from his native place in U.P. in search of employment to the house of the complainant and was staying with the complainant for about a month and a half prior to the incident. He was also engaged in stitching work. Despite this arrangement, the appellants used to pressurise the complainant and his family to vacate the house and threatened to set the house to fire.

4.4 About eight days prior to the incident, appellant No.1 had quarrelled with the wife of the complainant and her brother while the complainant was absent. When the complainant went to his father in the evening on that day to talk about the incident, appellant No.1 again quarrelled with him and insisted that the complainant should vacate the premises. On the next day, therefore, the complainant called Mohmad Aashiq Ansari, who happened to be the husband of the sister of appellant No.1, and other persons and, ultimately, a settlement was arrived at between the parties. Despite the settlement, both the appellants were quarrelling with the complainant and his family for vacating the house.

4.5 On the day of the incident, the complainant and his brother-in-law had taken a day off from the work. As per the complainant, they noticed that the appellants were discussing something inter se at a low voice. At about 10.45 hours, the complainant went to the shop of Barkatbhai, situated near Chartoda Kabrastan. At about 11.30, Sajidbhai (P.W.2) came running to him and informed that the appellants have set the house of the complainant to fire. Therefore, the complainant along with Barkatbhai rushed to the house and found that many people had gathered and the house was on fire and the neighbours were trying to put out the fire. It was noticed that brother-in-law of the complainant had sustained severe burns injuries and was made to sleep outside the house. The complainant and other persons rushed into the house and found that the wife of the complainant and the three daughters were also severely injured by burns. The injured were taken to the hospital. As per the say of the complainant in his complaint, he inquired of his brother-in-law as to how the incident occurred and his brother-in-law informed him that at about 11.30 hours, while they were watching the T.V. and both the appellants rushed to the house and poured kerosene on him as well as sister-Sajidaben and the three minior daughters of the complainant and, thereafter, went out of the house and closed the door from outside. They, therefore, raised shouts. About that time only,

appellant No.2 hurled a burning cloth through the top of the dividing wall and they had, therefore, sustained burns injuries.

4.6 After the victims were taken to the hospital, the three minor daughters and the wife of the complainant expired, whereas brother-in-law of the complainant-Izhar Ahmad was in a serious condition. He prescribed medicines and advised that the pain killers be given after the dying declaration is recorded. The doctor recorded a history in the case paper to indicate that it was given by the patient as well as his brother-in-law, i.e. the complainant and it was indicated that the patient sustained homicidal burns by the father and brother of brother-in-law of the patient, i.e. Izhar Ahmad.

4.7 While Izhar Ahmad was being treated at the hospital, the police was informed and the police summoned the Executive Magistrate to record the dying declaration of Izhar Ahmad. The Executive Magistrate, reacting to the call, immediately went to the hospital and recorded dying declaration. Izhar Ahmad, in his dying declaration before the Executive Magistrate, reiterated that the appellants had poured kerosene and set them ablaze. It transpires from the evidence that, almost immediately after the dying declaration was concluded, the condition of Izhar Ahmad deteriorated and within a short time thereof, he succumbed to the injuries.

5. On basis of the complaint, the police investigated the case, filed charge sheet in the Court of learned Metropolitan Magistrate, who, in turn, committed the case to the City Sessions Court and Sessions Case No.297 of 2000 came to be registered. The charge was framed against the accused persons at Ex.1 and revised at Ex.9 for the offences punishable under Sections 302 read with Section 34, 120-B and 506(1) and 34 of the Indian Penal Code. The accused persons pleaded not guilty to the charge. They claimed to be tried by the Sessions Court and, after considering the evidence on record, as stated above, the learned Additional City Sessions Judge recorded a conviction and inflicted capital punishment. Thus, the case is before us.

6. Before proceeding to record the contentions raised before us, it would be appropriate to state certain factual aspects.

6.1 It was noticed by us that, though the Trial Court, while recording statements of the appellants under

Section 313 of the Code of Criminal Procedure, had questioned the appellant about the recording of dying declaration, it had missed to put to the appellants the contents of the dying declaration so as to enable them to tender their explanation or defence and, therefore, they were summoned before this Court and specific questions were put to them indicating the contents of the dying declaration of Izhar Ahmad, recorded by the Executive Magistrate. The appellants asserted that the contents are no correct and they have been falsely implicated.

6.2 During the course of hearing and arguments, it was noticed by us that the name of the Investigating Officer was Ramanlal Bechardas Parmar. However, his evidence (Ex.56) as P.W.16 recorded on 18.6.2001 indicated his name as "Chimanlal Bechardas Parmar". This was brought to the notice of the learned Public Prosecutor, who was asked to make necessary inquiry and clarify the position. The Investigating Officer tendered an affidavit sworn by him and indicated that he had investigated the case and that his name is Ramanlal Bechardas Parmar. However, by a mistake that crept into the record of the Trial Court, his name is indicated as Chimanlal. By a separate order, we directed that the deposition given by the witness (P.W.16) may be read as given by Ramanlal Bchardas Parmar and not Chimanlal Bechardas Parmar.

6.3 It would also be appropriate to note that the appellants, as accused before the Trial Court, had requested for a defence counsel at the cost of the Government and they also made a similar prayer before this Court and the appeal is conducted by learned Advocate Mr. D.M. Shah, who has been appointed by this Court to represent the case of the appellants. For the State, learned Public Prosecutor Mr. A.D. Oza, assisted by Ms. Nandini Joshi, learned Additional Public Prosecutor, appeared.

7. Learned Advocate Mr. D.M. Shah for the appellants submitted that, if the evidence is considered, the whole case depends on the dying declaration alleged to have been made by deceased-Izhar Ahmad. Mr. Shah submitted that if the appellants are able to indicate that the dying declarations are doubtful and cannot be relied upon, they cannot be made basis of recording conviction. Mr. Shah submitted that if the evidence indicates that the dying declarations are recorded dehors the mandatory requirements, they could not have been relied upon by the Trial Court. Assailing the dying declaration (Ex.17), Mr. Shah submitted that,

admittedly, the Executive Magistrate did not consult the doctor about the consciousness and fit state of mind of the declarant deceased-Izhar Ahmad at the time of recording the dying declaration. The dying declaration was recorded at 4.55 P.M., almost two hours after the certificate issued by the doctor at 3.00 P.M. on the Yadi to the Executive Magistrate that the patient is conscious and is able to give dying declaration. Mr. Shah submitted that there is evidence to indicate that the condition of the declarant would change every half an hour and, therefore, there is no medical evidence to indicate that the declarant was conscious and in fit state of mind to give dying declaration. Mr. Shah submitted that this becomes all the more important when, undisputedly, soon after the dying declaration was recorded, it is found that the patient's/declarant's condition deteriorated and he succumbed to the injuries within a short time. Mr. Shah relied on the decision in the case of Paparambaka Rosamma & Ors. v. State of Andhra Pradesh, AIR 1999 SC 3455.

7.1 Mr. Shah assailed the genuineness of the dying declaration on basis of the language employed in the dying declaration. He submitted that, as admitted by the Executive Magistrate, the dying declaration was recorded in the language in which it was given. He has drawn attention of this Court to the answer to the first question in question No.4 in the dying declaration (Ex.17). The answer is in third person singular. Mr. Shah submitted that, if it was an answer given by the deceased, it would have been in first person singular. Likewise, he had drawn attention to the answer to the last question in question No.4 of the dying declaration in respect of place and time of the incident, where it is recorded that the incident occurred at 11.30 hours on 14.5.2000 in the house situate in Pujari'ni Chali. Mr. Shah submitted that, if such question is put to a man in the condition in which the deceased was, ordinarily he would have said that the incident occurred "today at 11.30" instead of giving the date. Mr. Shah, therefore, submitted that this indicates that the dying declaration was recorded at the instance of or with the assistance of a third person and, therefore, it cannot be considered as a dying declaration of the deceased-Izhar Ahmad.

7.2 Mr. Shah assailed the dying declaration on another count also. He submitted that the Yadi which was sent to the Executive Magistrate left nothing for the Executive Magistrate to be done. The Yadi gives full details of the incident. Nothing is left for the declarant to declare and, therefore also, the dying

declaration becomes doubtful.

8. As regards the history recorded by the doctor, Mr. Shah submitted that, if the case papers are seen, it is clear that the history is given not only by the deceased-Izhar Ahmad, but also by his brother-in-law, i.e. the complainant. It is not recorded in the words of the deceased by the doctor and, as such, it cannot be considered as a dying declaration.

9. Mr. Shah submitted that, as per the prosecution case, the complainant in his complaint has stated that Izhar Ahmad had made an oral dying declaration before him indicating the details of incident implicating the appellants. However, if the deposition of the complainant is seen, it is silent on this aspect. He is not confronted with his complaint by the prosecution. The Trial Court, however, considered this aspect while recording conviction, which is not proper.

9.1 Mr. Shah submitted that, as per the case of the complainant, he was informed by Mohmad Sadiq about the incident. However, if deposition of Mohmad Sadiq is seen, he does not claim to have witnessed the incident. He says that he reached the place of incident and found that the house was set ablaze and neighbours were trying to put off the fire.

9.2 Mr. Shah, therefore, urged that the whole case depends on the dying declaration recorded by the Executive Magistrate and that declaration being defective, as it is recorded in absence of a medical certificate about the consciousness and fit state of mind of the declarant, conviction could not have been recorded. He, therefore, urged that the appeal may be allowed.

10. By way of alternative submission, Mr. Shah submitted that the case before this Court cannot be considered as one falling in the category of rarest of rare cases where capital punishment is the only appropriate punishment. The appellants are not hardened criminals. They come from poor strata of the society, they are not educated and they have a family to look after. Confirming capital punishment would amount to punishing their family along with them. Mr. Shah submitted that, in a similar case, the Apex Court has also taken a view that capital punishment would not be appropriate. Mr. Shah, therefore, urged that, if the appeal is not accepted by this Court, the Confirmation case also may not be accepted and the capital punishment

may be commuted to imprisonment for life.

11. Learned Public Prosecutor, Mr. A.D. Oza, while supporting the Confirmation Case and opposing the appeal, submitted that, if the deposition of Taiyabali (Ex.13) and his complaint (Ex.14), deposition of Dr. Nayak (Ex.41), deposition of the Executive Magistrate (Ex.16) and the dying declaration (Ex.17) are read together, it would make it amply clear the observation by the Trial Court that the deceased-Izhar Ahmad, the declarant, was conscious and was in fit state of mind to give the dying declaration. His version is consistent from the beginning. He says before the complainant in the same language as he has stated in the dying declaration before the Executive Magistrate and in the history given by him before the doctor. Only because the Executive Magistrate failed to obtain a certificate/endorsement of the doctor about the consciousness and fit state of mind of the declarant on the dying declaration, the dying declaration cannot be rendered unreliable and cannot be disbelieved. Mr. Oza submitted that, if the Executive Magistrate is himself satisfied about the fit state of mind, getting a certificate from the doctor that the declarant is conscious and fit to make declaration is only a rule of prudence and undue importance may not be given to this aspect of the dying declaration. He relied upon the decision of the Apex Court in the case of Koli Chunilal Savji & Anr. v. State of Gujarat, 1999(2) GLH 859. Mr. Oza submitted that, in the instant case, the dying declaration made by the deceased-Izhar Ahmad before the Executive Magistrate is preceded by the case history recorded by the doctor and the oral dying declaration by the deceased before the complainant and consistent version is coming as was the case before the Apex Court in Koli Chunilal Savji (supra). In that case, the Apex Court accepted the dying declaration in spite of the fact that the endorsement was not there on the dying declaration, but it was made on the Yadi. Mr. Oza submitted that the appeal, therefore, may be dismissed.

12. As regards the confirmation of the capital punishment inflicted by the Trial Court, Mr. Oza submitted that there could not be a better case than this wherein capital punishment can be considered to be the only appropriate punishment. The appellants have, with premeditation, committed the crime while the complainant was away and his wife and three daughters and young brother-in-law were the only persons present in the house. For no tangible reason except that the appellants wanted the complainant and his family to leave the house, the offence is committed. The manner in which the

offence is committed indicates that it is a case of pre-planned multiple murders. Kerosene is poured on the persons of the deceased and they they are locked in the house. Appellant No.2 hurls a burning cloth from the top of the dividing wall which, ultimately, sets the house to fire, so also the deceased persons. Three children, aged 5, 4 and 2, have lost their lives, a lady and a young man of 22 years have also lost their lives. Deceased-Izhar Ahmad was a recent arrival and had no enmity or dispute with the appellants. Likewise, the three children also could not have any dispute with the appellants. Despite this, they have been done to death by the appellants by setting them to fire. Mr. Oza submitted that the incident would certainly have shaken the conscience of the society as well as the Court. He, therefore, urged that the punishment inflicted by the Trial Court may be confirmed.

13. We have gone through the record and proceedings which is before us. The learned advocates have also taken us through the record and proceedings to emphasize their respective versions.

14. We find from the record and proceedings that the prosecution has examined 15 witnesses as stated below :-

(1) P.W.1-Taiyabali Mohmad Mateen Ansari (Ex.13).
(2) P.W.2-Mahmadsadiq Mahmadsabir Ansari (Ex.15).
(3) P.W.3-Executive Magistrate, William Joseph Mekwan (Ex.16).
(4) P.W.4-Mahmad Mansa Mahmad Ismail Ansari - Panch (Ex.18).
(5) P.W.5-Hafij Mahmad Sharif Abdul Razak Qureshi Panch (Ex.19).
(6) P.W.6-Abdul Hameed Allabaksh Shaikh - Panch (Ex.25).
(7) P.W.7-Ashiqali Riyazahmad Shah - Panch (Ex.27).
(8) P.W.8-Govindbhai Virchandbhai Patni - Panch (Ex.29).
(9) P.W.9-Lalsing Pyaresing Rajput - Panch (Ex.31).
(10) P.W.10-Muslimkhan Sharifkhan Pathan - Panch (Ex.32).
(11) P.W.11-Dr. Harishchandra Gemarbha Jadav (Ex.34).
(12) P.W.12-Dr. Shilpaben Kanubhai Yadav (Ex.39).
(13) P.W.13-Dr. Nichhal Rajnikant Nayak (Ex.41).
(14) P.W.14-P.S.I., J.B. Parmar (Ex.52).
(15) P.W.15-Police Constable Rameshkumar Sakharam Gavade (Ex.54).
(16) Police Insepctor Ramanlal Bechardas Parmar Investigating Officer (Ex.56).

14.1 It also appears that the prosecution has produced several documents in support of its case. The important being (1) F.I.R. by Taiyabali Mahmad Mateen Ansari (Ex.14); (2) Dying declaration of Izhar Ahmad Bashir Ahmad Ansari (Ex.17); Yadi to the Executive Magistrate (Ex.53); Medical case papers of Sharda Hospital in respect of deceased-Izhar Ahmad (Ex.43); Pachnama of physical condition of appellant No.1 (Ex.28); Arrest Panchnama of appellant No.2 (Ex.33); and Panchnama of condition of appellant No.2(Ex.62).

15. At the outset, what appears is that the appellant-original accused has not challenged the factum of homicidal death of the deceased persons seriously. The contentions raised before this Court spin around the validity of dying declaration and acceptability of dying declaration. However,it may be worthwhile to state that, as per the suggestions made during the cross-examination and the statement of the accused, an attempt is made to indicate that there was an accidental fire by short circuit. However, considering the evidence of witnesses as a whole and the contents of the Panchnama of the place of incident, it is amply clear that there cannot be any doubt about the fact that all the deceased persons have not met with an accidental death. P.W.11-Dr. Jadav, in deposition at Ex.34, has clearly stated in his examination-in-chief that the injuries were of the nature which would indicate that they are homicidal. He, however, admits in cross-examination that he cannot definitely opine whether the burns/fatal injuries accidental, suicidal or homicidal. Same is the opinion of P.W.7-Dr. Shilpaben Kanubhai Yadav (Ex.39), who had examined the dead body of Sajidabanu.

15.1 Therefore, there is no oral medical evidence to indicate that the injuries sustained by the deceased persons were of homicidal nature.

15.2 If we fall back on the Panchnama of the place of offence at Ex.59, it has to be noted that out of two Panch witnesses, only one is examined at Ex.18, who has not supported the prosecution case and has been declared hostile. If the Panchnama is seen, there is reference to a piece of jute cloth lying near the door on the floor which smell of kerosene. There is another piece of same burnt cloth which smell of kerosene found near lying near the jute cloth. There are two more pieces of same burnt cloth found from the room, and out of which one smelt kerosene. It is also recorded in the Panchnama that the whole room smelt kerosene. A plastic container with kerosene smell was found from the room. However, there

is nothing to indicate that the fire was due to a short circuit as suggested in the defence.

16. The outcome of the above factual position is that the Court does not have any specific medical evidence to indicate that the death of the deceased persons were homicidal. The Panchnama of place of offence is not properly proved. The examination of Panchnama indicates presence of kerosene in the room and from the articles found therein. It is, therefore, difficult to arrive at a specific conclusion that the deceased persons had met with homicidal death without considering the dying declaration, which is the only piece of evidence which can throw light on the incident because the complainant does not have any personal knowledge about the incident and Mahmadsadiq Ansari, who informed the complainant about the incident, also does not depose about the incident except that he heard shouts and noticed fire. Although the possibility of accidental fire by short circuit, as suggested by the defence, does not inspire much confidence, the fact remains that the prosecution has not been able to establish the fact that the deaths were homicidal.

17. Taiyabali, the complainant, whose deposition is recorded at Ex.13 is the son of appellant No.1 and brother of appellant No.2. In his complaint/F.I.R. (Ex.14), he speaks of his relationship with the appellants and says that they have been staying at House No.70, Pujari'ni Chali, for last many years. The said house stands in name of his father-appellant No.1. He says that he and his wife were asked by appellant No.1 to leave the house and go to some other place or to the native place. He said in reply that, they have contributed half the amount for the construction of the house and, therefore, they will not leave the house. Appellant No.1, therefore, quarrelled with them and continued to quarrel on this count quite often. Appellant No.2 also sided with appellant No.1 and started quarrelling with them. He then states that about two months prior to the incident, similar quarrel took place and, therefore, the complainant constructed a dividing wall in the house and made a separate room for them. Appellants No.1 and appellant No.2 and his wife started staying in the other room. Then he says that his brother-in-law Izhar Ahmad came in search of work. He says that the appellants used to quarrel with them quite often and were asking them to vacate the house and were also intimidating them. He then says that about eight days prior to the incient, appellant No.1 quarrelled with his wife and brother-in-law while he was away and,

therefore, on learning about the same in the evening, he went to his father to talk. However, his father again quarrelled and insisted on him to vacate the house. He, therefore summoned his relatives Mohmad Ashiq and friend Barkatbhai and the disputes were resolved. However, even after the settlement, his father and brother (appellants) continued the pressure for vacating the house and gave threats for setting them to fire. He stated further in the complaint that on the date of the incident, he and his brother-in-law had taken a day off from work, if being Sunday. They noticed that the appellants were whispering inter se. He, thereafter, went to the shop of Barkatbhai, opposite Chartoda Kabrastan. While at the shop, Sadiqbhai, staying in Chatursing's Chali came running along with some other boys and informed that the appellants have set his house to fire. He, therefore, immediately rushed to the house and found that many people had gathered and were trying to put out the fire. His brother-in-law was badly burnt and was made to sleep outside the house. He along with other rushed into the house to find his wife and three daughters also in badly burnt condition. He then says that they took the injured persons to the hospital. He inquired from his brother-in-law Izhar Ahmad as to how it happened and was told by Izhar that while they were watching T.V. at about half past eleven, the appellants rushed into the house and poured kerosene on him, his sister Sajida and the three daughters and then locked the door from outside. They, therefore, raised shouts. At that time, appellant No.2 hurled a burning cloth from the top of the dividing wall and they, therefore, sustained burns injuries. The doctor by then declared his wife and the three dauhters as dead.

18. Now, looking at the deposition of the complainant, he sticks to his version about the previous quarrels, insistence on part of the appellants to vacate the house and then says that Sadiqbhai came to him and told him that the appellants have set their house to fire. He, therefore, rushed to the house to find all the deceased persons in a badly burnt condition. He, therefore, took them to the hospital and lodged a complaint. He has been cross-examined at length and despite a close scrutiny, it is found that he does not speak about his asking deceased-Izhar Ahmad about the incident and Izhar Ahmad informing him about the incident implicating the appellants. Thus, in his substantive evidence before the Court, there is no mention of any dying declaration made by Izhar Ahmad.

18.1 He admits in his cross-examination that the house

is situated in a thickly populated area and many persons pass by the house. He says that he does not remember the exact time when his F.I.R. was recorded. He admits in clear terms that when he gave the complaint, several persons were present. He also states that police had interrogated them. He says that police had even recorded their statements. He admits that the complaint/F.I.R. was given by him and the other person, who had accompanied him. He also admits that the police interrogated him even after 4.00 P.M. as he was not able to give details of the incident earlier. He denies the suggestion that the fire was caused due to electrical short circuit. He admits that he had seen his father at the hospital after about an hour.

19. Another important witness is Mohmadsadiq Ansari (Ex.15). In his deposition, he says that stays at Saiyad Riyadhusain's Chali in Gomtipur area at House no.46. He is engaged in machine repairing work which he does opposite Pujari'ni Chali on the road. He says that, on the day of the incident, he had gone to a house situated two to four house away from the place of incident for recovery of his dues. He heard shouts about the fire. He noticed smoke emitting from the house of Taiyabali, the complainant. He noticed that some persons had climbed up the roof. He, therefore, went to his shop. At that time, Taiyabbhai was sitting at a shop nearer to his own shop. He, therefore, informed Taiyabbhai that his house caught fire and some persons have sustained burns. Therefore, they went to the house of Taiyabbhai and noticed Izhar Ahmad having sustained injury. He says that the police had recorded his statement.

19.1 In cross-examination, he says that he often goes to Pujari'ni Chali and knows many people. At the time of the incident, about 200 persons had gathered, but he could not identify any of them. He says that he had waited at the site for about 15 to 20 minutes after hearing the shouts of fire. He went to his shop on his bicycle and informed the complainant. He does not know as to who had removed Izhar from the house. He says that his statement was recorded by the police on the next day of the incident in the police station. Nobody had come from the police station to summon him but the complainant had taken him to the police station. He denies the suggestion that he has falsely given the statement, at the instance of Taiyabali-the complainant.

20. It is thus clear on a comparitive reading of the depositions of the complainant and Mohmadsadiq that although the complainant says that he was informed by

Sadiq that his house is set to fire by the appellants, Mohmadsadiq does not say so. He says that he had heard the shouts of fire and had seen a crowd of about 200 people, but did not identify anyone. He states to have told the complainant that his home has caught fire and some persons are burnt.

20.1 Therefore, these pieces of evidence leading to the lodging of complaint and implicating the appellants become doubtful and the Court would expect some reliable piece of corroborating evidence before accepting the same, in view of the fact that the relations between the complainant and the appellants had strained following the property dispute just prior to the incident. This Court could not find nor could the prosecution indicate any other evidence except the dying declaration made before the Executive Magistrate and the history recorded by the Medical officer to support the prosecution case that the appellants had set the house and the deceased on fire. It would, therefore, be appropriate to examine the trust-worthiness, genuineness and reliability of those pieces of evidence.

21. As per the evidence of Dr. Nischal R. Nayak (Ex.41), he says that while he was on duty on 14.5.2000 at the Sharda Hospital as a Resident Doctor in the Plastic Surgery Department, Izhar Ahmad Basir Ahmad was brought before him at about 12.40 P.M. Izhar Ahmad had sustained burns injuries and was examined and treated by him. He found that Izhar Ahmedabad had sustained 94% burns injuries. When Izhar Ahmad was brought he was conscious and was able to talk. The doctor then says that, as per the history given by the patient and his brother-in-law, in respect of the patient himself and the three children, the injuries were caused by the father and brother of the brother-in-law of the patient, i.e. Izhar Ahmadabad, at about 11.30 A.M. In support of this version of the doctor, the prosecution has produced the medical case papers at Ex.43. A look at the case paper indicates that the doctor has recorded the alleged history of 'A/H/O' "Homicidal burns by father and brother of brother-in-law at 11.30 a.m. in closed space". Dr. Nischal Nayak in his deposition at a later point states that the case history was given by Izhar Ahmad and that he had not written down the case history in words of Izhar Ahmad, but it was written in his own words from what was stated to him.

21.1 Thus, what emerges is a dual and self-contradicory version of Dr. Nayak, one that the history was given by the deceased and his brother-in-law

and the other that the history was given by the deceased. It also emerges that the history was not written down in the words of the deceased-Izhar Ahmad. The first version gets support from Ex.43 wherein it is categorically written that the information was given by self plus brother-in-law, i.e. the complainant. It, therefore, cannot be accepted with certainty that the case history was given by the patient, i.e. deceased-Izhar Ahmad. It is too scanty a piece of evidence to be accepted for convicting the appellants of the offence, more so when there is no oher corroborative material.

22. Adverting to the dying declaration (Ex.17) recorded by the Executive Magistrate-William Joseph Mekwan (P.W.3), it runs as under :-

"DYING DECLARATION

Time of starting
D.D. : 16.55

Place: Shardaben Hospital
A.C.3/K.B. Room
Date: 14.5.2000

1. What is your name? : Izhar Ahmad Bazir Ahmad Ansari

2. What is your father's name? : Basir Ahmad Ansari

3. Where do you stay? : Poojarini Chali, Gomtipur.

4. What are you doing? : Does stitching work.

What is your age? : 22 years.

How far you studied? : Illiterate

What is your community?: Ansari Muslim.

Are you married? : No

Who all are staying along with you in the House? : Sajidabanu, Najmin, Mahembin, Najrin, Izhar, Taiyabali.

When and where the incident occurred? : Place: In the house at Poojarini Chali.
Time: 11.30 hours
Date: 14.5.2000

State the details of incident in brief. : Myself and family members were viewing film. Brother-in-law was not in the house. At that time, sister's father-in-law Matin Chaudhary, his son Pappu sprayed kerosene, closed the house and, thereafter, set fire and went away. The house, therefore, caught fire and all got burnt.

Did you try to commit suicide? : No

Has anybody caused burns to you? : Yes, Pappu and Matin Chaudhary set fire and caused burns.

Is anybody causing physical or mental torture to you? : No

Do you want to say anything more? : No

What is stated above is true and correct which is read over to me. I have signed after hearing and understanding.

Impression of left toe of Izhar Ahmad.

Before me
Sd/-
W.J. Mekwan
Executive Magistrate,
Metro Area, Ahmedabad

Time of completing the D.D. : 17.20
Opinion of the doctor that patient was

fully conscious at the time of recording D.D. is verified.

Concluded recording of D.D. after verifying that none of the relatives or Police Officer was present at the time of recording D.D.

Sd/-
(W. J. Mekwan)
Executive Magistrate
Metro Area, Ahmedabad.

Copy of Dying Declaration
received.

Sd/-
P. S. I., Gomtipur,
Date: 14.5.2000"

22.1 Thus from the dying declaration Ex.17 recorded by the Executive Magistrate-William Joseph Mekwan, examined at Ex.16, it appears that it was recorded between 16.55 and 17.20 hours of 14.5.2000. At the bottom of the dying declaration (Ex.17),l it is certified by the Executive Magistrate that the opinion of the doctor that the patient was fully conscious at the time of recording is verified and that the recording procedure of dying declaration is concluded after verifying that no relative, police or police officer was present at the time of recording of the dying declaration. In the dying declaration, the declarant had stated that he and other family members were viewing a film. Brother-in-law was not at home. At that time, sister's father-in-law named Mateen Chaudhary and his son Pappu poured kerosene, closed the house and set fire and went away. Therefore, the house caught fire and everybody got burnt. It is also asserted that Pappu and Mateen Chaudhary had caused burns injuries by lighting the fire.

22.2 It apparently appears that consciousness of the patient was verified from the doctor by the Executive Magistrate-William Joseph Mekwan, but if his deposition is seen, a different picture emerges.

23. In his deposition (Ex.16), William Joseph Mekwan states that he was on duty as Deputy Mamlatdar when he received a message at about 16.25, while he was at V.S. Hospital, to reach Shardaben Hospital and record dying declaration of Izhar Ahmad. The Yadi was served on him

by a policeman whose name and buckle number are written by him above his signature. The contents of the Yadi can be translated thus :

"To

The Executive Magistrate,
Metro Area, Court No.2,
Gheekanta, Ahmedabad City.

Sub: For taking D.D.

Request report with Jai Bharat from J.B. Parmar, Investigating Police Sub-Inspector, Gomtipur Police Station that -

One patient named as Izhar Ahmad Bashir Ahmad Ansari, aged 22 years, resident of Poojari'ni Chali, Gomtipur, Ahmedabad, who was got burnt for some reasons by his father Ahmad Mateen Habib and Pappu on 14.5.2000 at 11.30 hours. He is admitted to plastic surgery ward for treatment. At that time, his sister Sajidabanu Taiyabali Ansari, aged 26 years and his niece Nazmeen, ated 5, Nazreen, aged 4 and Taisimbanu, who were in the house, were severely burnt and on being brought to Shardaben Hospital, the doctor on duty in the casuality ward has declared Sajidabanu Taiyabali Ansari, aged 26 to be dead at 12.00 hours, whereas Nazmeen, aged 5 years and Nazreen aged 5 years and Taisimbanu aged 2 years are admitted in plastic surgery ward. Hereby, therefore, you are requested to come down and record dying declaration of said Izhar Ahmad Bashir Ahmad Ansari. Date: 14.5.2000.

Signature illegible.
Police Sub-Inspector,
Gomtipur Police Station.

The said Yadi contains following endorsement at the bottom.

Police Constable Uday Khan, 14..5.00
Buckle No.9130, 3.00 P.M.
Police Station Gomtipur. Pt. is conscious and can
Signature: Illegible give D/D.
16.30 P.M. Sign: Illegible."

23.1 The Executive Magistrate further says that when he reached Shardaben Hospital, Izhar Ahmad was introduced

to him by the police. He then asked the police people to go out. He then inquired of the patient about his name and his father's name. The patient had sustained burns injuries and bandages were applied, but he was able to hear. The patient was able to understand the questions. He had put questions to the patient, which were replied by him. He had written down the questions and the answers. After recording the dying declaration, he had read over the same to the patient and inquired whether that is correct. The patient said 'yes' to it. He, therefore, obtained the impression of left toe of the patient and, thereafter, he put his signature and applied his seal. He says that he had verified about the doctor's opinion that the patient was in conscious state of mind while giving the dying declaration. During cross-examination, he admits that the endorsement made by the doctor on the Yadi was made at 3.00 P.M. and he had not inquired about the condition of the patient between the giving of such certificate and recording of the dying declaration. During cross-examination, he admits that he had not obtained any opinion or certificate of the doctor before recording the dying declaration. He then clarifies that the endorsement made by him at the bottom of the dying declaration (Ex.17) that the opinion of the doctor that the patient was conscious at the time of recording of the dying declaration has been verified was written by him, but, in fact, he had not verified the condition of the patient at the time of recording the declaration, during the course of recording the declaration or after the completion of the dying declaration by calling the doctor. But he made the said endorsement on the dying declaration on basis of the endorsement made by the doctor on the Yadi at 3.00 P.M.

23.2 It is, thus, amply clear that the Executive Magistrate had not obtained any medical opinion about the consciousness and fit state of mind of the declarant at the time of recording of the dying declaration or after recording the dying declaration. The endorsement made by him was only on the basis of the certificate given by the doctor two hours prior to the recording of the dying declaration on the Yadi. It is also clear that the satisfaction recorded by him is not his own satisfaction, but is based on a certificate issued by the doctor two hours prior to the recording of the dying declaration.

23.3 These aspects will have to be considered in light of the medical evidence. Dr. Nischal Nayak (Ex.41) has admitted that when Izhar Ahmad was brought before him and examined by him, he was in a serious condition and his relatives were informed about it. The doctor has also

admitted that considering the injury sustained by Izhar Ahmad, his condition would change every half an hour to hour. He also admits that the case papers are silent about the change in condition of Izhar Ahmad between 12.30 P.M. and 5.45 P.M. It would be relevant to note that the doctor also does not claim to have examined Izhar Ahmad at the time of recording of the dying declaration.

23.4 The case papers (Ex.43) also indicate that there is no endorsement on it about the condition of Izhar Ahmad between 12.30 and 5.45 P.M. This becomes relevant because Dr. Nayak has stated that the condition of the patient is examined every half an hour/hour, but the endorsement in the case papers are made in the morning, afternoon and at night. In case of Izhar Ahmad, the case papers reveal that there is no endorsdement at all between 12.30 P.M. and 5.45 P.M. when his condition started deteriorating. The case papers indicate that at 5.45, he started gasping, the pupils were dilated, blood pressure was not recordale and at 6.00 P.M., it is recorded that there was no response, respiration was absent, pupils were dilated and fixed and blood pressure was not recordable. At 6.05 P.M. also same was the codition and 6.15 P.M., he was declared to have expired.

23.5 Thus, the dying declaration was concluded at 5.20 P.M., at 5.45 P.M., Izhar Ahmad started gasping and at 6.00 P.M., though not officially declared to have expired, he had stopped responding, respiration was absent and the pupils were dilated and fixed.

24. Thus, if an overall view of the evidence is taken, it is clear that when Izhar Ahmad was admitted to the hospital, he was in a serious condition. He is medically certified to be conscious and able to give dying declaration at 3.00 P.M. The dying declaration was recorded between 4.55 and 5.20 P.M. and at 5.45, his conditions deteriorates and he is found to have expired at about 6.15 P.M. There is medical evidence of Dr. Nayak, who says that, looking to the injury sustained by Izhar Ahmad, his condition would change every half an hour/hour. There is no medical certificate nor was there any medical examination got conducted before recording the dying declaration, at the time of recording the dying declaration or even after recording the dying declaration that Izhar Ahmad was conscious and that he was in a fit state of mind to give the dying declaration. Doctor was not even consulted by the Executive Magistrate. The certificate given by the Executive Magistrate at the bottom of the dying declaration is based on the

endorsement made by the doctor at 3.00 P.M. on the Yadi and, as such, there is no evidence whatsoever to indicate that the declarant was conscious and that he was in a fit state of mind to give the dying declaration. It would be too risky to record the finding of guilt on basis of such a dying declaration. In this regard, the decision of the Apex Court in the case of Paparambaka Rosamma v. State of Andhra Pradesh, AIR 1999 SC 3455 would be relevant and would be clearly applicable. The Apex Court observed that, in absence of medical certificate that the injured was in fit state of mind at the time of making the declaration, it would be very much risky to accept the subjective satisfaction of a Magistrate who opined that the injured was in fit state of mind at the time of making a declaration. In the case before us, we cannot accept such a satisfaction of the Executive Magistrate that Izhar Amad was in fit state of mind. In that case before the Apex Court, a certificate was appended to the dying declaration at the end by the doctor that the patient is conscious while recording the statement. The Apex Court observed that this was not sufficient as nothing was indicated about the fit state of mind of the patient at the time of making the declaration. The dying declaration was not accepted by the Apex Court and the conviction was set aside. Against this, reliance was placed by the learned Public Prosecutor on decision of the Apex Court in the case of Koli Chunilal Savji & Another v. State of Gujarat, 1999(2) G.L.H. 859, wherein the Court observed that recording of dying declaration in presence of doctor and getting it certified that the declarant is conscious and fit to make declaration is a rule of prudence. It was, therefore, urged that absence of such certificate will not vitiate the reliability of the dying declaration. On going through that judgment, it transpires that, in that case, the Executive Magistrate, after reaching the hospital, contacted the doctor who was treating the injured. The Executive Magistrate then ascertained from the doctor as to whether the declarant was in fit state of mind to give statement and the doctor made such an endorsement on the Yadi to the effect that the patient was fully conscious and signed the endorsement and, thereafter, the Executive Magistrate recorded the dying declaration. (These facts also emerge from judgment of this Court in the case reported in 1992(2) GLH 842). Therefore, factually, the Executive Magistrate had ascertained and verified the consciousness and fit state of mind of the declarant through a medical expert and had obtained a certificate. But the certificate/endorsement was made by the doctor on the Yadi rather than the dying declaration itself and, in that view of the matter, it was observed that there was

no justification for not accepting the dying declaration as there was evidence of the Executive Magistrate and the doctor. Against this, in the case before us, there is total lack of evidence to indicate the condition of the patient at the time of recording of the evidence. The Executive Magistrate did not consult the doctor before recording the dying declaration. The doctor says that the condition of the patient was serious when he was admitted and was such as would change every half an hour/hour. There is absolutely no evidence to indicate whether the patient was in fit state of mind to give the dying declaration. Pain killer drugs were decided to be administered after recording of dying declaration. Under the circumstances, in view of the decision in the case of Paparambaka Rosamma (supra), in our opinion, dying declaration (Ex.17) cannot be accepted as free from defect and conviction recorded by the Trial Court cannot be confirmed on basis of that dying declaration.

25. It would also be appropriate to indicate other factors which indicate the possibility of the declaration having been recorded with the assistance of or with interference of a third person. In column No.4 of the dying declaration, a question is put to the declarant as to "what are you doing?". The answer recorded is, "he is doing tailoring work". This means that the answer is given in third person singular as if it is given by a person other than the declarant. In the said very column, in the last question, it is asked as to where and when the incident occurred. The answer is recorded thus:

"Place: In the house at the Pujari'ni Chawl
Time : 11.30 hours, Date: 14.5.2000."

We agree with Mr. Shah that such reply cannot be expected from a person who has sustained 94% burns and was in a serious condition, when he was admitted and died soon after the dying declaration. Ordinarily, one would say that the incident occurred today at my house or at the house in Pujari'ni Chawl, but he would not give the date. Therefore, these two answers recorded by the Executive Magistrate which are claimed to have been written by him in the same language make the dying declaration susceptible to doubt its authenticity. The possibility of the details having been given by the person other than the declarant cannot be ruled out in light of the language of the dying declaration, particularly when the Executive Magistrate says that they were written by him in the same form.

26. The following salient features emerge :-

(1) The complainant is the son of appellant No.1 and brother of appellant No.2 and had property disputes.

(2) The complainant's substantive evidence before the Court is not consistent with his own F.I.R. In the F.I.R., he speaks of an oral dying declaration given by Izhar Ahmad, whereas in deposition, he is silent about that.

(3) The version of the complainant as to the origin of the incident is not supported by P.W.2-Mohmad Sadiq through whom the complainant claims to have derived knowledge. The version in the F.I.R. and in the deposition of the complainant about the incident is, therefore, rendered baseless as there is no other evidence left except the dying declaration.

(4) Complainant-Taiyabali says that he was informed by Mohmadsadiq that the appellants have set his house to fire whereas Mohmadsadiq in his deposition (Ex.15) is totally silent about it. In fact he does not claim to have seen the incident starting nor does he speak of presence of the appellants.

(5) The case history recorded by the doctor was given to him by the patient as well as his brother-in-law, i.e. the complainant, who had dispute with the appellants.

(6) The dying declaration before the Executive Magistrate was recorded without a medical opinion about consciousness and fit state of mind of declarant-Izhar Ahmad.

(7) The Yadi to the Executive Maistrate (Ex.53) contained all details of the incident.

(8) There is evidence that Izhar Ahmad was in a serious conditionl when he was brought; that his condition would change every half an hour/hour; and that pain killers were directed tobe given only after recording of the dying declaration.

(9) Izhar Ahmad died within a short time of the recording of dying declaration.

(10) There is no concrete and reliable evidence to come to a conclusion that the deceased persons had met with homicidal death.

27. In view of the above fatual aspects, in our opinion, the conviction cannot be confirmed on basis of dying declaration Ex.17.

28. In view of the above discussion, in our view, the Trial Court erred in relying on the dying declaration and other evidence, namely, the history recorded by the doctor and the complaint/F.I.R. as there is no other evidence to connect the appellants with the crime. The appeal, therefore, deserves to be allowed.

29. In view of our finding that the conviction could not have been recorded and the appeal deserves to be allowed, Criminal Appeal No.555 of 2001 will have to be allowed and is allowed. The conviction of the appellants recorded by the Trial Court is set aside. The appellants are acquitted of the offences for which they were convicted by the impugned judgment in Sessions Case No.297 of 2000. They shall be set at liberty forthwith, if not required in any other case.

30. Since the conviction is set aside, the question of confirmation of death sentence does not survive and Confirmation Case No.1 of 2001, therefore, stands dismissed.

[M.C. PATEL, J.]

[A. L. DAVE, J.]

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